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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

15 MARC SILVER, HEATHER PEFFER,  
16 ALEXANDER HILL, individually and on behalf  
of all others similarly situated,

17 Plaintiffs,

18 v.

19 BA SPORTS NUTRITION, LLC,

20 Defendant.

21 Case No: 3:20-cv-00633-SI

22 **DEFENDANT BA SPORTS NUTRITION,  
23 LLC'S OPPOSITION TO PLAINTIFFS'  
24 MOTION TO QUASH SUBPOENAS**

25 **Date:** November 6, 2020  
**Time:** 10:00 a.m.  
**Judge:** Hon. Susan Illston  
**Ctrm.:** 1, 17th Floor

26 Complaint filed: January 28, 2020  
27 FAC filed: July 7, 2020

28

Case No. 3:20-cv-00633-SI

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Defendant BA Sports Nutrition, LLC (“BodyArmor”) respectfully submits this Opposition to Plaintiffs’ Motion to Quash.

## **INTRODUCTION**

4 Plaintiffs' motion seeks to quash two subpoenas that request documents related to whether  
5 Plaintiffs were recruited and whether BodyArmor's competitor or another non-party is funding or  
6 assisting with the litigation (the "Subpoenas"). While Plaintiffs claim that "controlling law"  
7 precludes such discovery (Mot. at 1), they point to no such law and neglect to cite decisions such as  
8 *Gbarabe v. Chevron Corp.*, No. 14-CV-00173-SI, 2016 WL 4154849, (N.D. Cal. Aug. 5, 2016),  
9 where this Court compelled the very type of adequacy discovery that Plaintiffs claim is  
10 "extraordinary in [its] audacity." (Mot. at 3). *Id.* at \*2 ("the litigation funding agreement is  
11 relevant to the adequacy determination and should be produced to defendant ... the Court  
12 GRANTS Chevron's motion to compel and orders plaintiff to produce the litigation funding  
13 agreement to Chevron."); *see also Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-cv-02200-  
14 HSG KAW, 2017 WL 3124014, \*4 (N.D. Cal. July 24, 2017) (denying motion to quash deposition  
15 of Kaplan Fox investigator because whether he was soliciting plaintiffs was material to adequacy).

16 The motion, which Plaintiffs filed without properly meeting and conferring, seeks to avoid  
17 their obligation to produce evidence by making personal attacks against opposing counsel – which  
18 is exactly what the Court has already ordered Plaintiffs to stop doing. To be sure, BodyArmor’s  
19 counsel has aggressively pursued the rights of many in the federal courts, *see, e.g., Index*  
20 *Newspapers LLC v. United States Marshal’s Service*, \_\_ F.3d. \_\_, 2020 WL 5988501 (9th Cir.  
21 Oct., 9, 2020) (enjoining Trump administration from targeting and dispersing journalists at  
22 Portland’s Black Lives Matter protests), but it has not mistreated Plaintiffs or their lawyers. In  
23 contrast, Plaintiffs have been derisive in their communications, falsely tried to tarnish BodyArmor  
24 and its counsel in their papers, and yelled at one of BodyArmor’s attorneys.

25 On the merits, Plaintiffs do not dispute any of the issues BodyArmor raised in its letter brief  
26 about the Subpoenas (Dkt. No. 64). Plaintiffs do not dispute that soliciting plaintiffs is grounds for  
27 denying class certification. (Letter Brief at 2 (citing *Bodner v. Oreck Direct, LLC*, No. C 06-4756  
28 MHP, 2007 WL 1223777, \*2 (Apr. 25, 2007).) As Judge Patel held: “Solicitation of clients for the

1 commencement or continuation of a class action is improper, sufficient to warrant denial of class  
 2 action certification.” *Id.* (quoting *Meachum v. Outdoor World Corp.*, 171 Misc.2d 354, 654  
 3 N.Y.S.2d 240, 369 (1996)). Thus, discovery that may show that Plaintiffs were recruited rather  
 4 than injured, or part of a pattern of recruiting plaintiffs to manufacture putative class actions, is  
 5 material to issues Plaintiffs have raised in this case. *Id.* Plaintiffs also do not dispute that  
 6 documents related to third-party participation in the litigation are discoverable for similar reasons;  
 7 they go to adequacy, tend to show lack of injury and are relevant to cross-examining witnesses  
 8 about bias at trial. *Gbarabe*, 2016 WL 4154849, at \*2.

9 Finally, Plaintiffs do not carry their burden of proving that complying with the Subpoenas  
 10 would be difficult. To the extent that they do not have responsive materials, compliance would be  
 11 simple. Based on an Eighth Circuit case called *Shelton*, Plaintiffs argue that BodyArmor is  
 12 required to seek discovery from other sources first. (Mot. at 4.) But Plaintiffs do not disclose that  
 13 other circuits disagree with *Shelton* as contrary to the Federal Rules, and no case has ever imposed  
 14 such a requirement for putative class actions, where adequacy is a common issue. Fabricating such  
 15 a rule here would serve no purpose beyond making discovery more difficult and protracted.  
 16 Further, materials in the possession of Plaintiffs’ lawyers are within Plaintiffs’ possession, custody  
 17 and control, which means that Plaintiffs have to produce them anyway (identical discovery was  
 18 served on Plaintiffs). But when BodyArmor offered to obtain these documents from Plaintiffs  
 19 instead, Plaintiffs refused this proposal as well. It is thus apparent that Plaintiffs are simply trying  
 20 to obstruct and delay discovery on topics they admit are relevant.

21 For each of these reasons, Plaintiffs’ motion should be denied, and they should be ordered  
 22 to immediately comply with the subpoenas.

23 **BACKGROUND**

24 Plaintiffs’ statement of “facts” is largely devoted to attacks on counsel, which are dealt with  
 25 in the last section of this brief, and offers little discussion of the subpoenas at issue or Plaintiffs’  
 26 failure to object to the subpoenas and meet and confer about their objections. Those facts are  
 27 detailed below.

28

## A. The Subpoenas

As soon as the Court allowed discovery, BodyArmor properly served subpoenas on Kaplan Fox & Kilsheimer LLP and Reese LLP (“Subpoenas”) on September 25, 2020. The Subpoenas did not seek depositions of any attorneys, but included a narrow set of document requests, eight of which remain at issue.<sup>1</sup> (Declaration of Tracy O. Zinsou in Support of BodyArmor’s Opposition to the Motion to Quash Subpoenas (“Zinsou Decl.”), Ex. 1.) The Subpoenas request communications regarding the solicitation of plaintiffs in this action and other similar putative class actions, communications with Gatorade, an industry competitor of BodyArmor, and communications regarding litigation funding. (*Id.*)

**B. Plaintiffs Failed to Raise Issues in Dispute at Meet and Confer**

After receiving the Subpoenas, Plaintiffs' remained silent for a week and, then, on Friday, October 2, 2020, requested (without explanation or serving written objections) that "we meet and confer on Monday to discern whether you will withdraw the subpoena, or whether we need to proceed with a letter to the Court." (Zinsou Decl. ¶ 3, Ex. 2). BodyArmor agreed to a meet and confer and offered to permit Plaintiffs an extension of two weeks to respond to the Subpoenas to ease any time pressure in working out any dispute. (*Id.*, Ex. 2 at 2).

On Monday, October 5 at 8:08 am, prior to any meet and confer and without serving any objections, Plaintiffs sent an email insisting that they “do not intend to comply with an improper subpoena.” (*Id.*, Ex. 2 at 10.) The email cited no authority for their position and demanded that BodyArmor provide “Defendant’s section of a letter brief to the Court concerning the subpoena” that afternoon. (*Id.*, Ex. 2 at 10). BodyArmor responded that “Plaintiffs have not provided any authority for why they believe the subpoenas to be ‘improper’” and noted that Plaintiffs’ sudden demand to exchange letter brief sections on a few-hours’ notice “was unreasonable and does not comport with the Court’s rules” to meet and confer first. (*Id.*, Ex. 2 at 9.) Despite additional email

<sup>1</sup> As noted in Defendant's letter brief (Dkt. No. 64), Request No. 6 was inadvertently propounded and is withdrawn. Plaintiffs nevertheless continue to feature Request No. 6 throughout their brief as a purported example of why they believe the subpoenas are too broad and request supposedly privileged information. (Mot. at 6, 9).

1 requests for Plaintiffs to share the legal authority for their challenge, Plaintiffs refused to provide  
 2 any. (*Id.*, Ex. 2.)

3 On October 5 at 4:00 pm, BodyArmor had a call with Plaintiffs. (Zinsou Decl. ¶ 6). On the  
 4 phone call, Plaintiffs' lawyer repeatedly yelled at BodyArmor's counsel and refused to provide any  
 5 authority for Plaintiffs' general objection or provide any specific objections to the individual  
 6 document requests at issue. (*Id.* ¶ 7). BodyArmor again offered to extend the return date on the  
 7 Subpoenas by two weeks to allow more time for an informal resolution, but Plaintiffs refused. (*Id.*  
 8 ¶ 7). BodyArmor also noted on the call that similar requests had been served directly on Plaintiffs'  
 9 and stated that if Plaintiffs would commit to producing the requested documents directly, then any  
 10 duplicative documents would not need to be produced in response to the Subpoenas. (*Id.* ¶ 7, Ex. 2  
 11 at 5). Plaintiffs refused that offer. (*Id.* ¶ 7, Ex. 2 at 5.)

12 Less than one hour after the meet and confer had ended, Plaintiffs filed their already-  
 13 prepared letter brief. (Dkt. No. 62., Zinsou Decl. ¶ 11.) Plaintiffs failed to raise any of the case  
 14 law or the specific objections detailed in their letter brief (and now their Motion) during the meet  
 15 and confer call. (Zinsou Decl. ¶ 7, Ex. 2.) They never served any objections to the Subpoenas  
 16 raising or preserving any of the issues in their motion.

17 **C. Plaintiffs' "Firehose of Incivility"**

18 Plaintiffs claim, without citation, that BodyArmor has behaved uncivilly to their lawyers  
 19 and that they "do not invite or foment incivility in their cases." (Mot. at 1.) But just the opposite is  
 20 true. Plaintiffs have been insulting in their communications and have yelled at and tried to  
 21 marginalize BodyArmor's counsel.

22 BodyArmor's counsel Tracy O. Zinsou, Esq. sent the Subpoenas to Plaintiffs along with a  
 23 letter offering to discuss deposition dates. (Zinsou Decl., Ex. 3.) When Plaintiffs responded a  
 24 week later, they sent an email, but did not include Ms. Zinsou. (*Id.*, Ex. 2 at 11.) In their email,  
 25 they incorrectly stated that BodyArmor had "unilaterally" noticed the depositions, when in fact,  
 26 Ms. Zinsou's letter had expressly stated that "these deposition notices are subject to your clients'  
 27 availability" and offered to move the dates to accommodate Plaintiffs. (*Id.*, Ex. 3)

28

1           In response, Plaintiffs accused Ms. Zinsou of “a firehose of incivility and aggression” even  
 2 though she had never spoken with them before. (Zinsou Decl., Ex. 2 at 10.) When Ms. Zinsou  
 3 attempted to discuss the Subpoenas over the phone, Plaintiff’s lawyer yelled at her and spoke over  
 4 her. (Zinsou Decl. ¶ 8.) Plaintiffs followed this with a series of emails to Ms. Zinsou that made  
 5 more unnecessary attacks on her and our firm. By way of example:

6           >>> On Oct 6, 2020, at 8:47 AM, Maia Kats <MKats@kaplanfox.com> wrote:  
 7           >>>  
 8           >>> Tracy,  
 9           >>>  
 10           >>> This is more utter nonsense from BraunHagey.

11           (Zinsou Decl., Ex. 2.) The communication went on to say “You try to manufacture events and a  
 12 record through aggressive strategies and maneuvers to harangue and distract.” (*Id.*) And it further  
 13 accused her of a “record of incivility and frankly unfounded accusations.” (*Id.*) It was followed by  
 14 another email that read: “Addendum: More nonsense,” which was sent before Ms. Zinsou had a  
 15 chance to response to the first email. (*Id.*)

16           These emails were not an isolated occurrence. Plaintiffs continued, over several weeks, to  
 17 needlessly attack, dismiss and marginalize counsel. For example:

18           >> From: Maia Kats  
 19           >> Sent: Thursday, October 8, 2020 8:10 PM  
 20           >> To: Tracy Zinsou  
 21           >> Cc: Laurence King; Michael Reese; Mario M. Choi; Matt Borden; David Kwasniewski  
 22           >> Subject: Re: Meet and Confer  
 23           >>  
 24           >> Tracy -  
 25           >>  
 26           >> I'm going to ignore everything in your email except for dates.

27           (Zinsou Decl., Ex. 2 at 3.) To cap off their improper conduct, Plaintiffs threatened Ms. Zinsou with  
 28 sanctions – all for the crime of asking for three days in a row when Plaintiffs will agree to be  
 29 deposed. (Zinsou Decl., Ex. 2.) During all these abusive encounters, Ms. Zinsou was professional,  
 30 did not yell back or return Plaintiffs’ threats, and simply asked for three contiguous deposition  
 31 dates. (*Id.*) To date, Plaintiffs have not provided them. (*Id.* ¶ 5, Ex. 4.)

## **ARGUMENT**

2 Plaintiffs' motion fails both procedurally and substantively. As a threshold matter, the  
3 motion should be denied because Plaintiffs refused to meet and confer in good faith. On the merits,  
4 Plaintiffs offer no evidence or even argument to dispute the relevance of the Subpoenas, which  
5 undisputedly go to adequacy under Rule 23(a)(4). Plaintiffs likewise offer nothing to prove that the  
6 Subpoenas somehow seek privileged information, or would not be burdensome to comply with; in  
7 fact, they have not served any objections to the Subpoenas at all. The only argument they make is  
8 that BodyArmor's requests are subject to some type of heightened burden of proof or procedures.  
9 This argument, built from an Eighth Circuit case, is contrary to the Federal Rules and the way that  
10 other Circuits and courts have interpreted them, and has no bearing on putative "class" cases like  
11 this one. Their main rhetorical tactic appears to be to try to distract the Court from the merits by  
12 attacking BodyArmor's counsel. As shown in the last section, these attacks are false.

**13 | I. PLAINTIFFS FAILED TO MEET AND CONFER IN GOOD FAITH**

14 Plaintiffs claim that they “take *no* pleasure in this motion” (Mot. at 1 (emphasis in  
15 original).) But in fact, they did not meet and confer in good faith before bringing it, which is  
16 reason alone to deny their Motion. Judge Illston Standing Order, No. 3 (requiring a “good faith  
17 effort” to “meet and confer in person, or, if counsel are located outside the Bay Area, by telephone,  
18 to attempt to resolve their dispute informally.”); *see Mahach-Watkins v. Depee*, No. C 05-1143 SI,  
19 2007 WL 1394651, at \*1 (N.D. Cal. May 10, 2007) (“Plaintiff’s failure to meet and confer is reason  
20 alone for denying plaintiff’s motion.”).

21 Instead of trying to discuss and narrow the disputes, Plaintiffs did just the opposite. First,  
22 they never served any objections to the Subpoenas. Thus, prior to going to Court, they had not  
23 provided to BodyArmor in any form, much less discussed with BodyArmor, any argument about  
24 overbreadth. Their motion still argues about Request No. 6, which was duplicated from discovery  
25 served on Plaintiffs and inadvertently included, which BodyArmor withdrew in its letter brief  
26 (Letter Brief at 2.) Similarly, prior to seeking the Court’s intervention, Plaintiffs had not made any  
27 specific assertion of privilege for BodyArmor to agree or disagree with, and to date, have not done  
28 so.

1           Second, Plaintiffs' intention was always to file their motion, regardless. Prior to meeting  
 2 and conferring, Plaintiffs demanded that BodyArmor exchange letter briefs concerning the dispute.  
 3 (Zinsou Decl., Ex. 2.) When BodyArmor insisted that Plaintiffs have a phone call to try to work  
 4 through issues first and requested a small scheduling accommodation, Plaintiffs first said that all of  
 5 their lawyers were unavailable and that "we will initiate an opposition to the subpoena with the  
 6 Court." (Zinsou Decl., Ex. 2 at 8.) Plaintiffs backtracked shortly thereafter and agreed to speak,  
 7 but during the call they refused to engage in discussion of any specific objections to the requests in  
 8 the Subpoenas or the authority for their general objection to the Subpoenas as a whole. (Zinsou  
 9 Decl., ¶¶ 8-10.) Plaintiffs filed their letter brief less than an hour after the call, underscoring their  
 10 intention to ignore the meet and confer process. (Zinsou Decl., ¶ 8-11.)

11           As this Court has held, Plaintiffs' failure to properly meet and confer is reason alone for  
 12 denying their motion. *See Depee*, 2007 WL 1394651, at \*1; *see also Cardoza v. Bloomin' Brands,*  
 13 *Inc.*, 141 F. Supp. 3d 1137, 1146 (D. Nev. 2015) ("The Court finds that the truncated discussion  
 14 during the meet-and-confer process was insufficient to meet the counsel's obligations to engage in  
 15 a meaningful discussion as to each discovery dispute with the same specificity and support during  
 16 that process as they would in briefing a subsequent motion.").

17 **II. PLAINTIFFS DO NOT DISPUTE THAT THE SUBPOENAS SEEK RELEVANT,  
 18 NON-PRIVILEGED DOCUMENTS**

19           Plaintiffs offer no evidence, or even argument, that the Subpoenas seek information that is  
 20 irrelevant or privileged. For good reason. The information sought is relevant to adequacy, which  
 21 Plaintiffs have placed at issue by filing this case as a putative class action, and seeks the type of  
 22 facts that courts have found relevant to – and indeed, dispositive of – class certification.

23           Plaintiffs accuse BodyArmor of incivility for pursuing discovery about adequacy, but they  
 24 do not refute BodyArmor's due process right to obtain it. Under the established standard for the  
 25 scope of discovery under the Federal Rules, "Parties may obtain discovery regarding any  
 26 nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs  
 27 of the case..." Fed. R. Civ. Proc. 26(b)). Plaintiffs do not dispute that the discovery at issue is  
 28 relevant and make no effort to explain how it would be disproportional to the needs of the case.

1 Having failed to make such objections in response to the Subpoenas, failed to raise them during the  
 2 meet-and-confer process, and failed to raise them in their moving papers, Plaintiffs cannot do so for  
 3 the first time in reply. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (finding that the  
 4 “district court need not consider arguments raised for the first time in a reply brief.”) (citing  
 5 *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003); *Kunkel v. Dill*, No. 1:09-CV-00686-LJO,  
 6 2010 WL 4530225, at \*1 (E.D. Cal. Nov. 2, 2010) (denying plaintiff’s discovery motion because  
 7 plaintiff failed to properly set forth his arguments in his motion and “arguments made for the first  
 8 time in a reply are generally waived.”)

9       The Subpoenas seek only eight narrow categories of documents, targeted at Plaintiffs’  
 10 lawyers’ solicitation of Plaintiffs and other clients, communications with a market competitor of  
 11 BodyArmor, and litigation funding for this action. Each of these categories is undisputedly  
 12 relevant.

13       **A. Documents Related to Plaintiff Recruitment Are Relevant to Adequacy**

14       Requests 1 to 3 seek documents relating to whether Plaintiffs were recruited rather than  
 15 injured and whether there has been recruitment of plaintiffs in other matters.<sup>2</sup> These requests are  
 16 relevant to adequacy under Rule 23, which is a bedrock requirement of class certification. *See Fed.*  
 17 *R. Civ. Proc. 23(a)(4); Eisen v. Carlisle and Jacqueline*, 391 F.2d 555, 562 (9th Cir. 1968) (“as a  
 18 result of the sweeping changes in Rule 23, a court must now carefully scrutinize the adequacy of  
 19 representation in all class actions”).

20       As Plaintiffs do not dispute, class certification should be denied when the putative class  
 21 plaintiff was recruited. *See Bodner v. Oreck Direct, LLC*, No. C 06-4756 MHP, 2007 WL  
 22 1223777, at \*2-3 (N.D. Cal. Apr. 25, 2007). In *Bodner*, Judge Patel denied class certification for  
 23 lack of adequacy because she found that the plaintiffs had been recruited. She found that plaintiff’s  
 24 lawyer, and not plaintiff, was the “driving force behind” the litigation because the plaintiff admitted

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25       <sup>2</sup> Request No. 1 seeks “All COMMUNICATIONS and DOCUMENTS REGARDING the  
 26 solicitation of, or advertisement to, prospective plaintiffs in this action; Request No. 2 seeks “All  
 27 COMMUNICATIONS between YOU and topclassactions.com and/or the PERSONS  
 28 who own, control or run this website; Request No. 3 seeks “All COMMUNICATIONS and  
 DOCUMENTS REGARDING the solicitation of, or advertisement to, prospective plaintiffs in  
 other actions.” (Zinsou Decl., Ex. 1 at 4-5.)

1 that he was recruited by plaintiff's lawyer through a newspaper solicitation, all of plaintiff's  
 2 knowledge about the suit came from the lawyer, and plaintiff's lawyer had serially recruited  
 3 plaintiffs in past cases. *Id.* at \*2. Under these circumstances, Judge Patel held that this type of  
 4 "class action" is improper because it is a lawsuit constructed by lawyers in search of a "client":

5 That plaintiff's counsel constructed this lawsuit before it had a  
 6 plaintiff cannot be denied. This fact is borne out not only by  
 7 plaintiff's own admissions, but by plaintiff's counsel's previous  
 8 abortive attempt to bring a seemingly identical lawsuit in another  
 9 district. Indeed, counsel himself admitted at the hearing that he or his  
 firm had the research performed on the product at issue and had a  
 theory about the product's deficiencies. Then, armed with that  
 information they went in search of a plaintiff ...

10 *Id.* at \*3.

11 Similarly, in *Sanchez v. Wal Mart Stores, Inc.*, the court concluded that plaintiff failed to  
 12 prove adequacy where she had been recruited by counsel. 2009 WL 1514435, at \*3 (E.D. Cal. May  
 13 28, 2009). The court held: "The record here demonstrates that Plaintiff's counsel, and not Plaintiff,  
 14 is the driving force behind this action." *Id.* This was so because plaintiff only learned that she  
 15 allegedly had a claim against defendants after counsel "contacted her and told her so." *Id.* The  
 16 court rejected this "cart before the horse" approach to litigation finding it was "not the proper  
 17 mechanism for the vindication of legal rights." *Id.*; *see also Moheb v. Nutramax Labs., Inc.*, 2012  
 18 WL 6951904 (C.D. Cal. Sept. 4, 2012) (finding lack of adequacy where "Plaintiff became class  
 19 representative in this action through her long-time friendship with the mother of one of her counsel,  
 20 and that counsel had been researching the possibility of a class action with respect to Cosamin prior  
 21 to Plaintiff becoming a client.").

22 Plaintiffs argue that because BodyArmor was already able to find evidence that Plaintiffs'  
 23 lawyers had tried to solicit clients through its investigation, BodyArmor is not entitled to any  
 24 discovery on this subject. (Mot. at 3.) Like the defendant in *Bodner*, BodyArmor is entitled to  
 25 discovery that tends to prove that not only were Plaintiffs recruited, but their recruitment was part  
 26 of a broader pattern of constructing lawsuits and then finding plaintiffs to bring them. 2007 WL  
 27 1223777 at \*2-3 (noting that "The instant action is nothing more than Westrup, Klick bringing its  
 28 show to the Northern District and continuing its practice of selecting stand-in plaintiffs").

1           Further, whether a plaintiff has been solicited can require proof of intent. For example, in  
 2 *Keilholtz v. Lennox Hearth Products Inc.*, 268 F.R.D. 330 (N.D. Cal. 2010), defendants asserted  
 3 “that Plaintiffs’ counsel sent an investigator ‘door-to-door in a subdivision within this judicial  
 4 district to recruit individuals to serve as class representatives.’” *Id.* at 339. “Plaintiffs’ counsel  
 5 respond[ed] that they approached homeowners as part of their investigation, and not as part of a  
 6 solicitation effort.” *Id.* Judge Wilken held that “Although Defendants’ solicitation allegations are  
 7 troubling, without further evidence” she would not find lack of adequacy. *Id.* Evidence that  
 8 counsel had repeatedly recruited plaintiffs would have been particularly probative to resolving that  
 9 question.

10           In addition to being undisputedly relevant, BodyArmor has reason to believe that its  
 11 discovery is not a “fishing expedition” and will show recruitment. While they were outside the  
 12 materials that the Court could consider on a Rule 12(b)(6) motion, there is evidence that Plaintiffs  
 13 were recruited here. (Dkt. No. 20-1, Ex. 1 (advertisement posted by plaintiffs’ lawyers on  
 14 TopClassActions.com, entitled “BodyArmor SuperDrink Class Action Investigation”.) Courts  
 15 have allowed discovery into plaintiff recruitment under identical circumstances. For example, in  
 16 *Clark v. Hershey Co.*, No. C 18-06113 WHA, 2019 WL 913603, at \*2 (N.D. Cal. Feb. 25, 2019),  
 17 Judge Alsup held that proving recruitment on a Rule 12(b)(1) motion was too fact-bound, but that  
 18 questions as to whether plaintiffs were recruited through a website similar to the one that may have  
 19 been used here (classactionrebates.com) could be raised via summary judgment after “discovery on  
 20 the way in which plaintiffs came to counsel.” *See also Stavrides v. Mellon Nat. Bank & Trust Co.*,  
 21 60 F.R.D. 634, 637 (W.D. Penn 1973) (“It is apparent from the questions asked by defense counsel  
 22 that they were seeking to discover if two types of misconduct had occurred: solicitation and  
 23 maintenance. Those questions that appear reasonably calculated to lead to the discovery of  
 24 information on those two subjects we will order answered.”).

25           BodyArmor has additional reason to suspect a pattern of recruitment based on third-party  
 26 research, which has documented a massive uptick in food and beverage lawsuits in the Northern  
 27 District of California (causing it to be nicknamed “the Food Court”) that has been caused, in part,  
 28 by recruited plaintiffs. As one journalist has explained, with the passage of the Private Securities

1 Litigation Reform Act, many lawyers that had previously been filing stock-drop suits began suing  
 2 food and beverage companies instead. Vanessa Blum, "Welcome to the Food Court," *The*  
 3 *Recorder* (Mar. 01, 2013). Many of these cases are brought by fake public interest organizations or  
 4 plaintiffs that were recruited, rather than injured. *See, e.g., Guttmann v. Nissin Foods (U.S.A.) Co.,*  
 5 *Inc.*, No. C 15-00567 WHA, 2015 WL 4881073, at \*3 (N.D. Cal. Aug. 14, 2015) (dismissing  
 6 complaint for lack of standing because plaintiff was "a self-appointed inspector general roving the  
 7 aisles of our supermarkets. He continues on a five-year litigation campaign against artificial trans-  
 8 fat and partially-hydrogenated oil and has admitted that he has inspected products for those  
 9 ingredients before.").<sup>3</sup>

10 In light of all the facts above, BodyArmor has a reasonable basis for believing that the  
 11 Subpoenas will tend to lead to evidence that it needs to defend this case.

12 Finally, while Plaintiffs have castigated BodyArmor for its limited document requests and  
 13 insinuate that there has been no repeated recruitment, Plaintiffs are well aware that Courts have  
 14 specifically allowed even more intrusive discovery from their own lawyers. For example,  
 15 Magistrate Judge Kandis Westmore recently denied another motion to quash filed by Plaintiffs'  
 16 lawyers, where they sought to preclude the deposition of their "investigator" who had allegedly  
 17 recruited one of the plaintiffs in suit. Judge Westmore denied the motion to quash and allowed the  
 18 deposition to proceed because it was relevant to adequacy and whether the absent class members  
 19 were sufficiently protected:

20 The fact that Mr. Cosgrove, an employee of Kaplan Fox, was  
 21 Plaintiff Parikka's primary source of information forming the basis of  
 22 her claims in this action may present a conflict of interest. Here, Mr.  
 23 Cosgrove has apparently provided information to Plaintiff Parikka

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24 <sup>3</sup> While recruited plaintiffs have suffered no injury, the same cannot be said for the costs such cases  
 25 impose on the federal courts and food companies. There has been a 850% rise in food litigation in  
 26 the federal courts between 2008 and 2016. Cary Silverman and James Muehlberger, *The Food*  
 27 *Court: Trends in Food and Beverage Class Action Litigation* at 1, 5 (Feb. 2017). The Northern  
 28 District of California has been the most popular venue for these cases for years, shouldering the  
 burden of about 20% of food litigation cases nationwide. *Id.* at 2, 8. "While it takes minutes for  
 plaintiffs' lawyers to cut-paste-and-file a complaint, the cost of defending against a 'routine' class  
 action typically costs a company between \$1 million and \$17.5 million dollars, and can run far  
 higher." *Id.* at 5, 45. It is not uncommon for the named plaintiffs to be family members,  
 employees, or others with close ties to the network of lawyers that file the complaints. *Id.* at 14.

1 that led her to seek representation from his employer. If Mr.  
 2 Cosgrove is cultivating Plaintiff Parikka to be a class representative  
 3 for purposes of certification, and ultimately out of loyalty to his  
 employer, the interests of the absent class members to have their case  
 vigorously prosecuted may be impacted.

4 *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-cv-02200-HSG KAW, 2017 WL 3124014, at \*4  
 5 (N.D. Cal. July 24, 2017).

6 Other courts have similarly allowed discovery related to adequacy that is much broader than  
 7 the documents requested in the Subpoenas, such as discovery into ethical violations by Plaintiffs'  
 8 lawyers or depositions from them – none of which BodyArmor is seeking in its subpoenas. *See*,  
 9 *e.g.*, *White v. Experian Information Solutions*, 993 F. Supp. 2d 1154, 1170 (C.D. Cal. 2014)  
 10 (“unethical conduct, both before and during the litigation in question, is relevant to determining  
 11 whether counsel is adequate under Rule 23”); *Brown v. Am. Airlines, Inc.*, 2011 WL 13217553  
 12 (C.D. Cal. July 13, 2011) (finding Magistrate’s order denying defendant’s motion to compel  
 13 compliance with subpoena to opposing counsel seeking the “discipline information” of his firm as  
 14 “clearly erroneous” and ordering plaintiffs to comply with the subpoena because of the importance  
 15 of the adequacy requirement). The reason Courts have allowed such sweeping discovery into  
 16 adequacy derives from the constitutional due process concern that absent class members must be  
 17 afforded adequate representation “before entry of a judgment which binds them.” *Nutramax Labs.*,  
 18 2012 WL 6951904, at \*5 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

19 For all these reasons, Requests Nos. 1-3 are reasonably calculated to lead to the discovery  
 20 of relevant evidence and Plaintiffs’ motion to quash these requests should be denied.

21 **B. Documents Related to Third-Party Funding and Participation in the Litigation  
 22 Are Relevant and Discoverable**

23 The remaining requests in the Subpoenas are also relevant to adequacy. In particular,  
 24 Request No. 8 seeks “All documents regarding litigation funding related to this case,” which this  
 25 Court has held to be relevant in the class context. In *Gbarabe v. Chevron Corp.*, the defendant  
 26 sought production of plaintiff’s funding agreement and related documents because they were  
 27 relevant to determining adequacy of representation in a putative class action. No. 14-CV-00173-SI,  
 28 2016 WL 4154849 (N.D. Cal. Aug. 5, 2016) at \*1. This Court agreed and concluded that “the

1 litigation funding agreement is relevant to the adequacy determination and should be produced to  
 2 defendant.” *Id.* at \*2. This Court also noted that the confidentiality provision of the funding  
 3 agreement did not prohibit disclosure, but even if it did, such a provision would not override  
 4 discovery obligations or a court order. *Id.* Tellingly, Plaintiffs neglect to cite this decision.

5 Similarly, Requests 4, 5, and 7 of the Subpoenas seek documents and communications with  
 6 Gatorade, BodyArmor’s competitor.<sup>4</sup> These all, again, go to the heart of adequacy and are relevant  
 7 to whether Plaintiffs will protect the interests of the class or are potentially beholden to the interests  
 8 of a market competitor. For example, in *In re Graphics Processing Units Antitrust Litig.*, 253  
 9 F.R.D. 478, 498 (N.D. Cal. 2008), Judge Alsup disqualified a representative plaintiff in a class  
 10 action alleging price fixing of graphics cards where the plaintiff was involved in a separate  
 11 litigation involving one of defendant’s competitors and had “purportedly [] taken an inconsistent  
 12 position with this suit.” *Id.* Judge Alsup explained that “[i]t appears as if [plaintiff] along with his  
 13 counsel have attempted to contrive litigation” and “[s]uch behavior amounts to an abuse of the  
 14 class action process.” *Id. see also Sipper v. Capital One Bank*, 2002 WL 398769 (C.D. Cal. 2002)  
 15 (“the court emphatically disagrees with counsel’s relevance argument and is surprised by class  
 16 counsel’s attitude toward a matter of such importance. A central concern of the Rules of Civil  
 17 Procedure governing class actions is ensuring that the class action format is not hijacked by parties  
 18 or attorneys to their own ends at the expense of the other class members. Of particular concern,  
 19 “courts fear that a class representative who is closely associated with the class attorney would  
 20 allow settlement on terms less favorable to the interest of absent class members.”) (citing *Susman*  
 21 *v. Lincoln American Corp.*, 561 F.2d 86, 91 (7th Cir. 1977)); *Gordon v. Sonar Capital Mgmt. LLC*,  
 22 92 F. Supp. 3d 193, 198-200 (S.D.N.Y. 2015) (collecting cases) (finding lack of adequacy where  
 23 plaintiff has financial relationship that might compromise his ability to “exercise independent

24  
 25  
 26 <sup>4</sup> Request No. 4: “All COMMUNICATIONS with GATORADE or the GATORADE SPORTS  
 27 SCIENCE INSTITUTE.”; Request No. 5: “All DOCUMENTS REGARDING GATORADE or the  
 28 GATORADE SPORTS SCIENCE INSTITUTE.”; Request No. 7: “All COMMUNICATIONS with  
 NAD RELATED TO this case.” (Zinsou Decl., Ex. 1 at 2.)

1 judgment in those situations, such as settlement negotiations, in which the interests of the class and  
 2 counsel may diverge”).

3 Here, Plaintiffs have repeatedly invoked Gatorade as a paradigm for proper marketing (*See, e.g.*, Dkt. No. 48 at 4, 18 & n.25, 19; Dkt. No. 43, ¶¶ 1-2, 8-10, 97-99; Dkt. No. 1, ¶¶ 82-84.) They  
 4 have likewise repeatedly made reference to the NAD proceedings (a private industry dispute  
 5 resolution mechanism) between BodyArmor and Gatorade, and mirrored Gatorade’s arguments  
 6 against BodyArmor. Plaintiffs have therefore put Gatorade at issue, and the Subpoenas seek to  
 7 uncover the role Gatorade is playing in this litigation. *See, e.g., Nelson v. Millennium Labs*, Case  
 8 No. 2:12-cv-01301-SLG, 2013 WL 11687684, \*5-6 (D. Ariz. May 17, 2013) (ordering production  
 9 of plaintiff’s fee agreements because defendant asserted that market competitor was funding  
 10 litigation). If Plaintiffs have had no such communications with Gatorade, as they appear to  
 11 contend, then responding to the Subpoenas will be simple.

12 Plaintiffs cannot simply decline to participate in discovery on matters that do not conform  
 13 with their theory of the case. They concede that the discovery sought may be “useful” but instead  
 14 argue that it is somehow not “crucial.” (Mot. at 10.) However, Plaintiffs’ perception of “what this  
 15 litigation is about” ignores that Plaintiffs themselves chose to file this litigation as a putative class  
 16 action. Adequacy is one hurdle they must meet in challenging BodyArmor’s truthful marketing.  
 17 The Subpoenas seek information that goes to the heart of the class certification inquiry, and  
 18 Plaintiffs do not contend otherwise.

19 **C. The Documents Sought Are Not Privileged**

20 Plaintiffs make only a feeble attempt, citing no case law, to argue that the documents at  
 21 issue are covered by work product or attorney-client privilege. (Mot. at 9). Plaintiffs’ conclusory  
 22 statement that “many if not all the requests encompass” privileged documents fails to carry their  
 23 burden of proving that an applicable privilege applies. (Mot. at 9). *See Loop AI Labs Inc v. Gatti*,  
 24 No. 15-CV-00798-HSG(DMR), 2016 WL 787924, at \*6 (N.D. Cal. Feb. 29, 2016) (party asserting  
 25 privilege on a motion to quash bears the burden of proving that it applies); *California Sportfishing*  
 26 *Prot. All. v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 644 (E.D. Cal. 2014) (party seeking to  
 27 withhold information has burden of proving application of work product protection). The lone  
 28

1 example Plaintiffs misleadingly cite is Request No. 6 – the Request BodyArmor expressly  
 2 withdrew in its letter brief (ECF No. 64 at 2) as Plaintiffs acknowledge a few pages earlier.<sup>5</sup> (Mot.  
 3 at 6, 9). Plaintiffs do not even attempt to argue how any other Request seeks the production of  
 4 exclusively, or even any, privileged information. Because they cannot.

5 First, litigation funding agreements, and any communications with Gatorade and the NAD,  
 6 third-parties who Plaintiffs’ counsel do not claim to represent, are clearly not privileged. *See, e.g.*,  
 7 *Gbarabe*, 2016 WL 4154849 at \*2 (recognizing putative class counsel’s concession that funding  
 8 agreement was not privileged and should therefore be produced); *Bryant v. Mattel, Inc.*, 573 F.  
 9 Supp. 2d 1254, 1274 (C.D. Cal. 2007) (holding that “Mattel’s question regarding who is paying  
 10 Bryant’s legal fees … is likewise not objectionable” and that “fee-payment arrangements are  
 11 relevant to credibility and bias, and if asked in discovery, [plaintiff] must disclose who is paying  
 12 his legal fees.”).

13 The same holds true for materials related to recruitment of prospective plaintiffs. *Auscape*  
 14 *Int’l v. Nat’l Geographic Soc’y*, No. 92 CIV.6441 LAK, 2002 WL 31250727, at \*1 (S.D.N.Y. Oct.  
 15 8, 2002) (finding “letters to prospective clients to encourage their involvement in a class action” are  
 16 not privileged); *Taylor v. Waddell & Reed, Inc.*, 2011 WL 1979486 (S.D. Cal. May 20, 2011)  
 17 (finding plaintiff’s lawyer’s letter to putative class members and the responses not privileged or  
 18 work product); *Schiller v. City of N.Y.*, 245 F.R.D. 112, 117-18 (S.D.N.Y. 2007) (finding no  
 19 attorney-client relationship for pre-litigation questionnaires). In *Fangman v. Genuine Title, LLC*,  
 20 2016 WL 3362538, \*3 (D. Md. June 7, 2016) (collecting cases), the Court compelled plaintiffs to  
 21 produce “solicitation materials” and rejected the same arguments Plaintiffs make here. The Court  
 22 rejected the claim “that solicitation materials sent by SGS to potential Plaintiffs or class members  
 23 are evidently prepared in anticipation of litigation and are, therefore, shielded from discovery by  
 24 the work-product doctrine.” *Id.* First, the Court noted that such materials are provided when an

25  
 26 <sup>5</sup> Plaintiffs argue that Defendant’s withdrawal was belated because it occurred after Plaintiffs filed  
 27 their letter brief. However, Defendant would have withdrawn it earlier had Plaintiffs properly  
 28 followed the Court’s procedures. Plaintiffs refused to make specific objections to any request  
 during the parties meet and confer or prior to filing their letter brief. (Zinsou Decl. ¶ 9). Had they  
 done so, the parties could have conferred about specific objections and narrowed the dispute  
 earlier.

1 “attorney-client relationship had not yet been established.” *Id.* The Court further reasoned that  
 2 such materials do not contain mental impressions in any event. *Id.*

3 Accordingly, Plaintiffs have not proven that any of the requests in the Subpoenas seek  
 4 privileged information.

5 **D. Plaintiffs Have Not Proven that Producing the Requested Information Would  
 6 Be Unduly Burdensome**

7 Plaintiffs argue, without offering any evidence, that the discovery sought is categorically  
 8 burdensome. (Mot. at 8). As the party seeking to withhold relevant evidence, Plaintiffs bear the  
 9 burden of offering such proof. *In re Yassai*, 225 B.R. 478, 483–84 (Bankr. C.D. Cal. 1998)  
 10 (denying motion to quash finding movants did not meet “heavy” burden in demonstrating undue  
 11 burden where they presented “no evidence pertaining to the time, cost, or inconvenience”); *Miller*  
 12 v. *Ghirardelli Chocolate Co.*, No. C 12-4936 LB, 2013 WL 6774072, at \*2 (N.D. Cal. Dec. 20,  
 13 2013) (“On a motion to quash a subpoena, the moving party has the burden of persuasion under  
 14 Rule 45(c)(3) . . .”) (citing *Chevron Corp. v. Donziger*, No. 12-MC-80237 CRB (NC), 2013 WL  
 15 4536808, at \*4 (N.D. Cal. Aug. 22, 2013)). Plaintiffs have failed to do so. They have not even  
 16 given any indication of what the actual burden of producing such a limited set of documents would  
 17 be. Plaintiffs argue only that responding to the discovery would be a “time sink for counsel who  
 18 would otherwise be preparing Plaintiffs discovery of Defendant.” *Id.* Plaintiffs do not explain why  
 19 their two law firms and multiple attorneys of record are unable to both respond to discovery and  
 20 propound it. To the contrary, Plaintiffs claim BodyArmor would be “sorely disappointed if the  
 21 subpoenaed documents were produced by Plaintiffs’ counsel” suggesting that Plaintiffs are aware  
 22 of documents that are responsive to the Subpoenas and could easily produce them. (Mot. at 11).

23 Plaintiffs have not shown any burden, and the Subpoenas are within the scope of  
 24 permissible discovery. Accordingly, the documents should be produced.

25 **III. PLAINTIFFS’ ATTEMPT TO IMPOSE ADDITIONAL REQUIREMENTS THAT  
 26 ARE NOT IN THE FEDERAL RULES FAILS**

27 In seeking to quash the Subpoenas, Plaintiffs argue that they are improper under  
 28 “controlling case law” (Mot. at 1.) But Plaintiffs have cited no such precedent in the Ninth Circuit.  
 Plaintiffs invoke *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) and “its

1 progeny" (Mot. at 4), but none of these cases are binding on this Court, and in any event, all are  
 2 inapplicable here for at least three reasons: (1) they are contrary to other circuit precedent and the  
 3 plain language of the Federal Rules, (2) they have never been applied to putative class actions,  
 4 where adequacy is an issue, and (3) *Shelton* was intended to protect the attorney-client relationship,  
 5 not documents.

6 Foremost, the heightened standards set out by the Eighth Circuit in *Shelton* do not comport  
 7 with the plain language of Rule 26. For this reason, the Second Circuit and other courts have  
 8 rejected applying *Shelton*, even where, unlike here, a party seeks to take the deposition of the other  
 9 side's counsel. *See In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2d Cir. 2003)  
 10 (rejecting *Shelton* and finding that "the standards set forth in Rule 26 require a flexible approach to  
 11 lawyer depositions whereby the judicial officer supervising discovery takes into consideration all of  
 12 the relevant facts and circumstances to determine whether the proposed deposition would entail an  
 13 inappropriate burden or hardship"); *Phillips v. Indianapolis Life Ins. Co.*, No. 1:060-CV-1544-  
 14 WTL-JMS, 2009 WL 1564384, at \*3 (S.D. Ind. June 3, 2009) (rejecting "*Shelton*'s heightened  
 15 burden-of-proof rule" because it "finds no support in the plain text of the Federal Rules of Civil  
 16 Procedure"); *In re Allergan, Inc.*, 2016 WL 5922717, at \*3 (C.D. Cal. Sept. 23, 2016) (rejecting  
 17 *Shelton*, noting that "the Ninth Circuit has never adopted the *Shelton* framework" and that "*Shelton*  
 18 is not universally accepted"). The remaining cases cited by Plaintiffs are largely out-of-Circuit  
 19 district court cases (Mot. at 5), none of which is binding.

20 Equally importantly, no case has applied the *Shelton* rule in the context of a putative class  
 21 action. Neither *Shelton* nor any of the cases Plaintiffs cite (Mot. 4-5) have been applied in the class  
 22 action context. Although BodyArmor explained that *Shelton* and *Fausto v. Credigy Services Corp.*,  
 23 No. C 07-5658 JW (RS), 2008 WL 4793467 (N.D. Cal. Nov. 3, 2008), do not apply on this basis in  
 24 their Letter Brief, Plaintiffs fail to respond to this distinction in their Motion and do not address  
 25 Judge Guilford's reasoning in *Brown v. Am. Airlines, Inc.*, which is more apt here. 2011 WL  
 26 13217553 (C.D. Cal. July 13, 2011). In *Brown*, the defendant subpoenaed plaintiffs' counsel for  
 27 documents related to their history of class action litigation and "discipline history." *Id.* \*1. In  
 28 granting motions to compel the discovery, and reversing a Magistrate's recommendation to the

1 contrary, the Court distinguished *Shelton*, precisely because it was not a class action case, noting  
 2 that filing a putative class case “puts adequacy of class counsel at issue”:

3 But the key consideration is that this case is a class action. Defendant  
 4 seeks information about class counsel to oppose a motion for class  
 5 certification, a motion which puts adequacy of class counsel at issue.  
*Shelton* was not a class action case and is thus distinguishable...

6 Further, in the context of class certification, the Court has ongoing  
 7 concerns about the due process rights of absent class members. The  
 8 rights of unnamed individuals are largely in the hands of counsel for  
 9 the named plaintiff. When ruling on a motion for class certification,  
 the Court has the responsibility of protecting those unnamed class  
 members from undue risk of inadequate advocacy. Thus, the Court  
 takes Defendant’s requested discovery particularly seriously.

10 *Id.* at \*2

11 Plaintiffs’ argument that their “motivations for bringing this suit are not salient” to the  
 12 relevance of the Subpoenas (Mot. at 9) is, therefore incorrect in the class action context. And  
 13 again, none of the cases Plaintiffs’ cite for this proposition (Mot. at 8-9) is a putative class action.  
 14 As explained in *Brown* and further above, adequacy of counsel and injury to the plaintiffs are  
 15 crucial findings to be made in a putative class action in the context of class certification. *Shelton*  
 16 and its “progeny” say nothing about discovery directed at putative class counsel.

17 Additionally, *Shelton* was never intended to apply to subpoenas for documents. At issue in  
*Shelton* were specific questions asked during the deposition of defendant’s in-house counsel  
 18 concerning the existence or nonexistence of documents that the plaintiffs believed the defendant  
 19 possessed but had not produced during discovery. *Id.* at 1325–26. The defendant’s attorney did in  
 20 fact appear for her deposition but refused to answer questions about her knowledge of the existence  
 21 of the documents despite the magistrate judge’s order to do so. *Id.* at 1325. The district court held  
 22 that the attorney’s refusal to comply with the magistrate judge’s orders warranted a default  
 23 judgment against the defendant. *Id.* The Eighth Circuit reversed, finding that opposing counsel’s  
 24 testimony regarding her knowledge of certain relevant documents was privileged as work product  
 25 and noting its concern that deposing opposing counsel could have a “chilling effect” on candid  
 26 communications between that counsel and his or her client. *Id.* at 1327.

27  
 28

1       The *Shelton* rule arose out of a desire to protect the attorney-client relationship, and  
 2 practically speaking, to shield trial counsel from the risk of disqualification by being turned into a  
 3 witness at trial. *See In re Subpoena Issued to Dennis Friedman*, 350 F.3d at 70-71 (rejecting the  
 4 *Shelton* rule and finding that the rule arose “out of concern that the relationship between attorneys  
 5 and clients be protected” similar to the disruptive “practice of forcing another party’s trial counsel  
 6 to testify as a witness”); *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 730 (8th Cir. 2002)  
 7 (declining to extend *Shelton* and finding that “The *Shelton* test was intend to protect against the ills  
 8 of deposing opposing counsel in a pending case which could potentially lead to the disclosure of  
 9 the attorney’s litigation strategy.”) On the other hand, the *Shelton* court also “recognize[d] that  
 10 circumstances may arise in which the court should order the taking of opposing counsel’s  
 11 deposition.” *Id.* And the Eighth Circuit expressly noted that the documents themselves that  
 12 plaintiffs sought were **not privileged**, and indeed, had mostly already been produced. *Id.* (noting  
 13 that trial counsel had indicated that the documents about which plaintiffs’ counsel was inquiring  
 14 had been previously produced and that it would be willing to answer the same questions through  
 15 the depositions of other employees who were not attorneys). Some courts have even suggested  
 16 written discovery, such as interrogatories, as an alternative to taking the deposition of opposing  
 17 counsel. *See In re Subpoena Issued to Dennis Friedman*, 350 F.3d at 71 (“These factors may, in  
 18 some circumstances, be especially appropriate to consider in determining whether interrogatories  
 19 should be used at least initially and sometimes in lieu of a deposition.”); *In re Allergan, Inc.*, No.  
 20 2016 WL 5922717 at \*3 (“*Shelton* applied its three part test to an attempt to *depose* opposing trial  
 21 counsel...It is not at all clear that *Shelton* extends to other forms of discovery.”).

22       The *Shelton* rule, therefore, was not intended to protect documents, but instead to shield  
 23 opposing counsel from having to testify about their mental impressions as related to those  
 24 documents which might reveal their strategy. The Subpoenas are entirely consistent with this  
 25 reasoning. BodyArmor does not seek to “dispense with interrogatories, document requests, and  
 26 depositions of lay persons,” and simply turn Plaintiffs’ counsel into a witness to probe their “legal  
 27 theories and strategy.” *Id.* at 1327. Nor will the Subpoenas be disruptive to Plaintiffs’ attorney-  
 28 client relationship with its lawyers. To the contrary, BodyArmor properly seeks the production of

1 relevant, non-privileged documents, as discussed in Section II above. The Court should order  
 2 production of these documents.

3 **IV. PLAINTIFFS' ATTACKS ON BODYARMOR'S COUNSEL ARE FALSE AND  
 4 MISLEADING**

5 As part of their effort to avoid producing documents, Plaintiffs apparently did a Westlaw  
 6 search for “sanctions” and the name of defense counsel to assail our firm. In addition to being the  
 7 very type of irrelevant *ad hominem* attacks the Court warned Plaintiffs against, Plaintiffs’ citations  
 8 are incomplete and misleading.

9 Plaintiffs represent that in *S.E.C. v. Small Business Capital Corp.*, No. 5:12-cv-03237 EJD,  
 10 2012 WL 6584953, at \*1-2 (N.D. Cal. Dec. 17, 2012), the Court “den[ied] Defense counsel’s  
 11 motion for sanctions.” (Mot. at 3.) In that case, however, our firm represented the subject of an  
 12 SEC prosecution for the limited purpose of trying to unfreeze his funds so that he could retain us.  
 13 After our efforts proved unsuccessful, we moved to withdraw, and the client filed a pro se motion  
 14 for sanctions. The motion was obviously signed by him, which Plaintiffs would have known had  
 15 they bothered to look. (Declaration of Matthew Borden (“Borden Decl.”), Ex. 1.)

16 Plaintiffs’ citation to *In re ComUnity Lending* (Mot. at 3), is also misleading. In that case,  
 17 we represented ERISA beneficiaries whose life savings had been taken by their former employer.  
 18 Magistrate Judge Lloyd recommended imposing evidentiary sanctions because Defendant had  
 19 withheld evidence and witnesses until after discovery had closed. (Borden Decl., Exs. 2-3.) At  
 20 trial, Judge Ware declined to adopt Magistrate Lloyd’s recommendation because he decided that  
 21 the prejudice had been cured by Defendant’s belated document production.

22 In *Stone Brewing Co., LLC v. Miller Coors LLC.*, No. 18cv331-BEN(LL), 2019 WL  
 23 4450754, at \*7 (S.D. Cal. Sept. 17, 2019), a trademark dispute over our client’s mark STONE,  
 24 Magistrate Judge Lopez granted in part and denied in part our client’s motion to compel but  
 25 declined to impose sanctions. What Plaintiffs do not explain (Mot at 2-3), is that six weeks later,  
 26 upon further consideration and argument, Judge Lopez granted our client’s motion for monetary  
 27 discovery sanctions because Defendant had withheld critical materials without justification. *Stone*  
 28 *Brewing Co., LLC v. Miller Coors LLC.*, 2019 WL 5677844, at \*6 (“The Court finds monetary

1 sanctions to be an appropriate less drastic sanction that will still serve to address the prejudice  
 2 Plaintiff has suffered from Defendant's misconduct.”).

3 Plaintiffs cite *Walker v. B&G Foods, Inc.*, No. 15-cv-03772-JST, 2019 WL 3934941, at \*4  
 4 (N.D. Cal. Aug. 20, 2019), as a case “denying Defense counsel’s motion to sanction opposing  
 5 counsel.” (Mot. at 2). This is also untrue. As seen from the Order, our firm did not file a sanctions  
 6 motion but instead indicated that the Court *could* impose sanctions for the improper filing under  
 7 Rule 11(c)(3). What Plaintiffs also neglect to mention is that when our firm actually did file a  
 8 motion to sanction Mr. Walker, that motion was granted by the Ninth Circuit. (Borden Decl., Ex.  
 9 4.) They also neglect to mention that Mr. Walker dismissed his case with prejudice, after  
 10 maintaining a baseless labeling lawsuit against our client for five years, when he could no longer  
 11 avoid appearing for deposition.

12 *Katziff v. Beverly Enterprises, Inc.*, 2009 WL 10729569 (D. Mass. Apr. 17, 2009), (Mot. at  
 13 3), predicated the formation of our firm. The undersigned counsel represented a class of the oldest  
 14 and most vulnerable ERISA plan members who had incurred substantial losses to their investments  
 15 in the plan’s stable value fund as a result of Defendants’ mismanagement. In the order cited by  
 16 Plaintiffs, Magistrate Judge Sorokin granted in part and denied in part my clients’ motion to  
 17 compel, “without prejudice to the extent it seeks sanctions,” *id.* at \*4, and denied Defendants’  
 18 motion for sanctions. With the threat of sanctions pending, Defendants finally produced the  
 19 smoking gun document that ended the case (a finding by the Department of Labor that they had  
 20 breached their fiduciary duties).

21 *Anderson v. Ghaly*, (Mot. at 3), is a § 1983 case our firm brought against the State of  
 22 California for its refusal to enforce its own federally-mandated hearing decisions to protect the  
 23 state’s poorest and neediest nursing home residents. *See Anderson v. Ghaly*, 930 F.3d 1066 (9th  
 24 Cir. 2019). After repeated negotiations with numerous state officials, we sent a letter to Governor  
 25 Newsom, asking him to change the state’s unlawful practice. (Borden Decl., Ex. 5.) After the  
 26 Governor refused to do anything, we sent a subpoena asking what he had done to address the issues  
 27 we had raised, and the Court quashed the subpoena. There is nothing sinister about losing a motion  
 28 to quash, and our firm has a fine working relationship with the State’s lawyers. For that matter, we

1 have a perfectly good relationship with President Trump's lawyers at Main Justice and the Office  
 2 of the Solicitor General – with whom we are extremely ideologically opposed – none of whom  
 3 have tried to bully our associates or engage in any of the other hostilities detailed above.

4 Finally, *Rainsy v. Chevron Corp.*, No. 16-mc-80258-DMR, 2017 WL 5508913, at \*4 (N.D.  
 5 Cal. Nov. 17, 2017) (Mot. at 3), is an international human rights case that we filed on behalf of the  
 6 leader of the opposition party in Cambodia. Our client has lived in exile since a grenade attack by  
 7 the totalitarian ruler Hun Sen failed to kill him (but killed his bodyguard), and we sought  
 8 documents from Chevron to defend against Hun Sen's *in absentia* prosecution against Mr. Sam for  
 9 criminal "defamation." Ultimately, we obtained some of the evidence we sought, did not obtain  
 10 other evidence, and had other materials subjected to a protective order such that they cannot be  
 11 filed publicly.

12 **CONCLUSION**

13 For the foregoing reasons, the Motion to Quash should be denied.

15 Dated: October 23, 2020

Respectfully Submitted,

16 BRAUNHAGEY & BORDEN LLP

17 By: /s/ Matthew Borden  
 18 Matthew Borden

19 *Attorneys for Defendant*  
 20 *BA Sports Nutrition, LLC*